In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 474

HOME SHIPPING COMPANY, S.A., AS OWNER OF THE S.S. "COSMIC," PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner instituted this action under the Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*, seeking a judgment of $600,000 against the United States for damages incurred when the S.S. *Cosmic*, petitioner's ship, struck the partially sunken, marked wreck of U.S.N.S. *Mission San Francisco*. The alleged fault of the United States as owner of the wreck, upon which the action was based, lay in the mode of marking the stern of the wreck, which protruded into the channel. The stern was marked with a quick-flashing green light placed on its deck.

After a lengthy trial, the district court found for

232-343—66

the United States (L. App. 2a,[1] 239 F. Supp. 226 (D. Del.)). The court found that at the time of the collision the wreck was marked with appropriate buoys and lights in accordance with an agreement reached at a meeting attended by the president of the local pilots association and with the Wreck Act, 33 U.S.C. 409, and the Coast Guard's applicable regulation; that the pilot in charge of the *Cosmic* had an intimate personal knowledge of the location of the wreck and the lights and buoys marking it; that any experienced pilot should have been able to pilot the *Cosmic* past the stern of the *Mission* on a clear night (as was the night of the collision) even if the green light on the *Mission*'s stern had been out entirely; that the green light on the *Mission*'s stern was not out at the time of the collision, but was shining substantially at its normal brilliance,[2] was unobstructed, and was plainly visible long before necessary for navigational purposes; and that there was no causal connection between the degree of brightness of the light or its location and the collision. The court concluded that there had been no negligence or fault on the part of the United States, that the wreck had been properly marked, and that the collision had been caused solely by the *Cosmic*'s navigational error and/or faulty rudder.[3]

[1] "L. App." references are to the printed appendix filed below by petitioner. "R. App." references are to the reproduced appendix filed below by the United States.

[2] This finding in turn rested on the court's subsidiary finding that the voltage drop reported some six hours later was caused by damage to the batteries resulting from the collision.

[3] The court also found that the *Cosmic*'s log had been altered so that the original entry, which stated that the collision had

On appeal, the court of appeals affirmed *per curiam*, ruling that the district court's finding that the United States was guilty of no negligence was "not clearly erroneous" (Pet. 17, 359 F. 2d 435 (C.A. 3)).

The only issues here are factual ones, and in order to recover petitioner would have to overcome three separate findings of the district court each of which is dispositive: (1) that the United States was guilty of no negligence in marking the wreck of the *Mission*; (2) that there was no causal connection between the manner in which the wreck was marked and the collision; and (3) that the collision was caused solely by a faulty rudder and/or navigational error on the part of the *Cosmic*. Each of these findings has ample support in the record, including the crucial issue whether the marker light was dim and inadequate before the collision scattered the batteries (*e.g.*, R. App. 67a; 10a; 12a; 19a; 21a; 54a; 74a; 90a; 91a; 92a).[5] To the extent there was conflicting testimony, it was a matter for the trier of fact. The suggestion by peti-

---

been due to poor maneuvering of the pilot, had been changed to place responsibility on the alleged inadequacy of the marker light.

[4] Petitioner's construction of the Wreck Act and the Coast Guard regulations and manual would require that the wreck have been marked by a buoy that would have narrowed the channel still further and been prone to being dislodged by passing ships. See 239 F. Supp. at 231. Placing the light on the floating wreck, as the court found, had been found the most efficacious marking at a meeting which included the president of the local pilots association.

[5] The testimony set out by petitioners at Pet. 14 appears to relate to the period *after* the *Cosmic*'s collision.

tioner (Pet. 15) that the "clearly erroneous" rule does not apply in admiralty cases has been resolved to the contrary by this Court (*McAllister* v. *United States,* 348 U.S. 19), and is particularly inappropriate now that the Federal Rules of Civil Procedure, including Rule 52(a), apply expressly to admiralty cases. Since two courts have agreed on the proper resolution of the factual disputes, further review is not warranted. *E.g., Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

SEPTEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

Office-Supreme Court, U.S.
FILED
SEP 29 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, ~~1965~~ 1966

No. 474

HOME SHIPPING COMPANY, S.A., as owner of the S/S COSMIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ELI ELLIS,
Counsel for Petitioner,
26 Broadway,
New York, N. Y. 10004.

WILSON & LYNAM,
HILL, BETTS, YAMAOKA, FREEHILL & LONGCOPE,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1965

No. 474

HOME SHIPPING COMPANY, S.A., as owner of the S/S COSMIC,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Respondent's memorandum filed in opposition to the petition herein is mistaken in its assertion (Respondent's memorandum, 3, 4) that petitioner suggested that the "clearly erroneous" rule of this Court (*McAllister* v. *United States*, 348 U. S. 19, 20) does not apply in admiralty.

Instead, petitioner contends (Petition, 2, 15) that the Court of Appeals for the Third Circuit misapplied the